accused was found sitting in the driving seat and do not extend to any antecedent period. But evidence that a person found in the driving seat was asleep does not prove such person had no intention of driving, even though it well may have a bearing on the existence or otherwise of such intention. It seems to me that, while the operative words admittedly appear to require the proof of a negative there must nevertheless, to satisfy the proviso, be adduced some evidence of a positive resolution not to drive before the inference ordinarily to be drawn from occupation of the driver's seat can be said to have been rebutted.

The respondent did in fact give evidence himself tending to establish that he had formed prior to being found by the Police an intention not to drive any more. The learned Magistrate as a result of the view he took of the law failed to express any opinion on the truth or otherwise of this important portion of the evidence, and in the absence of a finding on the point the trial cannot be regarded as having been satisfactory. The appeal must be allowed.

I think the fairest course in the circumstances is to order a new trial on the same charge before another Magistrate, and I direct accordingly.

New trial ordered.

Solicitors: *Elias Bros.*

MOHAMED HANIFAH v. PUBLIC PROSECUTOR

[A. Cr. J. (Buhagiar J.) February 7, 1956]

[K. L. — Criminal Appeal No. 82 of 1955]

Penal Code, s. 193 — Giving false evidence — Evidence Ordinance, 1950, s. 76 — Certified copy of Notes of Evidence — Not dated — Whether admissible.

A certified copy of the notes of evidence which is not dated will not be admitted in evidence in a case under s. 193 of the Penal Code.

The date is an essential requirement of the certificate and there are obvious reasons why this is so as is apparent from other provisions of the Evidence Ordinance. The words of s. 76 of the Evidence Ordinance are too clear to admit of any gloss upon them. A certified copy raises certain presumptions under s. 79; under subsection (1) of this section the Court shall presume that any officer by whom such document purports to be certified held, when he signed it, the official character which he claims in such document. It is obvious therefore that the date is essential for the purpose of establishing whether on a particular date the officer held the official character which he claims.

Observations on certified copies.

Case referred to:—

(1) *In re Tan Ah Chuan & Anor.* (1954) M.L.J. 135.

MAGISTRATE'S CRIMINAL APPEAL.

A. K. Sen for the appellant.

J. G. Adams (Federal Counsel) for the respondent.

Buhagiar J. : — The appellant was charged with an offence punishable under section 193 of the Penal Code in the Sessions Court at Kuala Lumpur. He was found guilty, convicted and sentenced to three months' imprisonment.

The prosecution alleged that the appellant had made a statement to a Police Officer in the course of a Police investigation and in the course of the preliminary inquiry the appellant in giving evidence denied that he had made any statement to a Police Officer. The prosecution produced a certified copy of the notes of evidence taken, recorded by the Magistrate at the preliminary inquiry — Ex. P2.

The appellant appealed against conviction on the ground that the learned President erred in admitting as evidence the said certified copy which was not properly certified under section 76 of the Evidence Ordinance, 1950.

Now Ex. P2 consists of notes of evidence of five witnesses with a covering note with a certificate as follows:—

"Certified herein true copy of the record
Abdul Rani
Magistrate, Kuala Lumpur."

There is also the seal of the Magistrates' Court — Kuala Lumpur. The certificate is not dated. This Exhibit purported to be a certified copy of a public document under section 76 of the Evidence Ordinance, 1950. There is no question that if a public document is certified to be a true copy in accordance with the provisions of that section, such certified copy is admissible in evidence and, under section 77, may be produced in proof of the contents of the public document. Section 76 provides that the certificate "shall be dated and subscribed by such officer with his name and his official title."

Before the learned President objection was raised to the admissibility of this exhibit on the ground, *inter alia*, that the certificate was not dated; and counsel for the defendant relied on *In re Tan Ah Chuan & Anor.*[1]. The learned President, however, took the view that the point raised by the defence in that case was not the substantial point under consideration and he treated the opinion of Spenser Wilkinson J. on this point as *obiter dictum*. The learned President ruled that the omission of the Magistrate when certifying the document, although no doubt an irregularity, did not, in his view, vitiate the validity of the document as certified copy admissible in evidence to prove the contents of the document of which it

purports to be a copy. In his view that document was what it purported to be, namely, a certified copy of the notes of evidence taken by the Magistrate, Inche Abdul Rani, in the preliminary enquiry of the 8th and 16th March, 1955.

In the above mentioned case, Spenser Wilkinson J. said: "I think the words of section 76 of the Evidence Ordinance are too clear to admit of any gloss upon them. The section says "such certificate shall be dated and subscribed by such officer with his name and official title...." The requirement that the certificate shall be dated has as much force as the requirement that it shall be subscribed. If, therefore, the certificate is not dated then the copy is not a certified copy." That part of the judgment is not an *obiter dictum*. The point was raised in the Court below and was argued on appeal; and the learned Judge considered that there was a ground on which the accused in that case were entitled to be acquitted. I am in full agreement with the opinion of Spenser Wilkinson J. on section 76. The date is an essential requirement of the certificate and there are obvious reasons why this is so as is apparent from other provisions of the Evidence Ordinance. Apart from the words used in section 76, which as stated above are "too clear to admit of any gloss upon them", a certified copy raises certain presumptions under section 79; under sub-section (1) of this section the Court shall presume certified copies to be genuine if the document is substantially in the form and purports to be executed in the manner directed by law in that behalf and under sub-section (2) the Court shall presume that any officer by whom such document purports to be certified held, *when he signed it*, the official character which he claims in such document. It is obvious, therefore, that the date is essential for the purpose of establishing whether on a particular date the officer held the official character which he claims.

I held, therefore, that Ex. P2 was not admissible in evidence and in default of any evidence as to what the appellant had said at the preliminary enquiry he should have been acquitted and I allowed the appeal and quashed the conviction.

It may be convenient if I add here the following observations on certified copies. It has been the practice, for the purpose of proving what a witness has said in a judicial proceeding, to produce certified copies of the depositions. Such certified copies are no doubt admissible in evidence, under section 76 of the Evidence Ordinance, 1950, if executed in the manner directed by that section. Such practice was necessary until the amendment of section 176 of the Criminal Procedure Code under which in proceedings of summary trials in the subordinate Courts, the Court was required to keep a record of the particulars of each case in the Charge Book and in the Magistrate's Note Book. Under that section, as amended by the 1953 Subordinate Courts (Forms of Proceedings) Rule No. 1 (L.N. 239/53), the particulars of each case are now included in a separate record. That being so there is now no reason why the original record should not be produced in evidence and the provisions of section 80 of the Evidence Ordinance will apply.

Another point I would like to mention is with regard to the officer certifying that a copy is a true copy of the record. The mode of taking and recording evidence in the subordinate Courts is prescribed by statute, i.e., section 176 of the Criminal Procedure Code; the evidence recorded by a President of a Sessions Court or a Magistrate are not private notes as the notes taken by a Judge in the High Court, and, subject to the provisions of section 433 of the Criminal Procedure Code, such records are public documents within the meaning of section 74 of the Evidence Ordinance, 1950. That being so, the officer who is responsible for the safe-keeping of such documents and who has the custody thereof is the Registrar or other officer performing the duties of Registrar, (and exceptionally in some Courts a Magistrate performs the duties also of Registrar) and in my opinion, therefore, the certificate should be subscribed and dated by the Registrar or such officer.

Appeal allowed.

MOHAMED ALI v. PUBLIC PROSECUTOR

[A. Cr. J. (Buhagiar J.) March 15, 1956]

[K. L. — Criminal Appeal No. 7 of 1956]

Criminal trial — Sentence of whipping — Punishment of whipping should be reserved for crimes of violence.

It is true that s. 380 of the Penal Code permits the passing of sentence of whipping, but it is not the policy of the Courts to impose sentences of whipping unless the offence has been committed with substantial violence.

[**Editorial Note:** In **Endut bin Bakar Kuala Trengganu** — Criminal Appeal No. 36 of 1955 Mathew C.J. gave a similar ruling. In Singapore the sentence of whipping under s. 380 of the Penal Code has been abolished by the Criminal Justice (Punishment-Amendment) Ordinance, 1954.]

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

J. G. Adams (Federal Counsel) for the respondent.

Buhagiar J. : — This was an appeal against sentence on a charge of theft in a dwelling house of 200 cigarettes, an offence punishable under section 380 of the Penal Code. On conviction the learned